

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1495

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

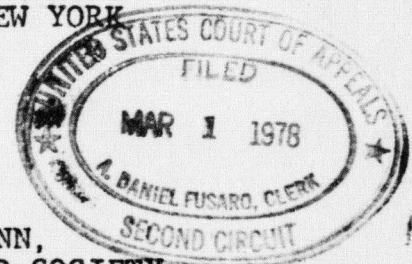
-----X
:
:
UNITED STATES OF AMERICA, :
:
Plaintiff-Appellee, :
:
-against- :
:
WALTER JOHN KUBIT, :
:
Defendant-Appellant. :
:
-----X

Docket No. 77-1495

B
P/s

APPENDIX

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



MARTIN ERDMANN,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

1051

07 05 77 0508 01

18:495
18:1708

Forging & uttering U.S. Treasury checks
Possession of stolen mail

1-32
33-48

18:1001
18:495

False statements to Veteran's Administration
Forging endorsement on U.S. Treasury check

1-5
6-13

77-424

BAIL - RELEASE

☐ Delinquent	☐ Fugitive
☐ Pending	☐ Pending Release
☒ PSA	
Conditions	
☐ Date	☐ 10% Deposit
☐ Bail Not Made	☐ Surety Bond
☐ Status Changed (See District)	☐ Collateral
	☒ 3rd Party Cust
	☐ Other

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began * 4/5/77	High Risk Date Information ☐ 7-5-77	7-21-77	Trial Set For Voor Dire ☐	Disposition of Charges
Summons Served	Indict. Waived ☐	1st Plea 7-21-77	Trial Began 9-27-77	☒ Convicted
First Appearance	In Charging District Superseding ☒ Indict/Info ☐ 9-19-77	Final Plea	Trial Ended 10-5-77	☐ Acquitted
				☐ Dismissed
				☐ On Government's Motion

DATE	INITIAL NO.	MAGISTRATE	OUTCOME
4/5/77	LB-08AH	INITIAL APPEARANCE DATE > 4/5/77 PRELIMINARY EXAMINATION { Date Scheduled > 4/25/77 REMOVAL OR { Date Held > HEARING ☐ WAIVED ☒ NOT WAIVED ☐ INTERVENING INDICTMENT	☐ DISMISSED ☐ HELD FOR CJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR CJ OR OTHER PROCEEDING IN DISTRICT BELOW
18 USC 495 - FORGE AND UTTER A U.S. TREASURER'S CHECK			

Richard Ziegler

ATTORNEYS
David Gordon, Federal Defender Services Unit
2 Lafayette St., 5th Floor, N.Y.C. 10007
577-3407 - 454

DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE DELAY
4/5/77	Complaint filed, defendant presented, Legal Aid assigned. Defendant released on his own recognizance.	
7/5/77	INDICTMENT FILED 77 Cr. 0508.....Ward, J.	
7-14-77	Adjourned to 7-15-77 at 10:30 a.m.....Ward, J.	
7-15-77	Deft. (atty. David Gordon present). R.O.R. with PSA supervision. Ordered F/P. Adjourned to 7-21-77 at 10:30 a.m.Ward, J.	
7-21-77	Deft. (atty. David Gordon present) pleads not guilty. Deft. continued R.O.R. with PSA supervision. Ordered re-finger-printed. Case assigned to Pierce, J. for all purposes.Haight, J. -	
7-22-77	Filed following papers from Magistrate Leonard Bernikow 1. Complaint 2. Disposition Sheet 3. FDSU order appointing counsel.	

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY		
	(DOCUMENT NO.)		Interim Section 4 (a)	Final End Date (b)	LT Code (c)
7-29-77	Deft. present with atty. David Gordon, trial set for 9-26-77 Deft. cont'd ROR under supervision of P.T. Service....Pierce, J.				
9-20-77	Filed def't's proposed voir dire question.				
9-19-77	Filed Superseding Indictment & referred to Pierce, J.Palmieri, J.				
9-21-77	Filed Gov't requests to charge.				
9-23-77	Filed def't's requests to charge.				
9-27-77	Jury trial begun as to all counts.				
9-28-77	Trial cont'd				
9-29-77	"				
9-30-77	"				
10-3-77	Trial cont'd, Court charges jury				
10-4-77	Deliberations cont'd				
10-5-77	Jury reaches a verdict. Jury finds def't. not guilty on cts. 1 through 5 inclusive, and guilty on each of cts. 6 thru 13 inclusive. PSI ordered. Sentence 11-16-77 at 4:30 p.m. Bail is set at \$5,000 PRB to signed by def't. and James CollinsPierce., J.				
10-6-77	Filed PRB in the amount of \$5,000 without security, pending sentence, def't's address: 45 Wadsworth Terrace, Washington Hqts., N.Y., co-signer: James Collins, address: 1 Seaman Ave. New York, N.Y.				
10-11-77	Filed Gov't supplemental requests to charge.				
11-3-77	Filed Nolle Prosequi ^{on the} ^{and}granted..11 -1-77Pierce, J.				
11-15-77	Filed def't's motion to set aside verdict and judgment of acquittal, or for new trial.				
11-21-77	Filed Gov't Affdvt. in opposition to def't's motions for acquittal or new trial.				
12-19-77	Filed Notice of Appeal from the judgment entered on 12-14-77. Leave to proceed in Forma Pauperis hereby granted....Pierce, J. (mailed copies to def't. & U.S. Atty)				

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

(S) 77 Cr 508

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

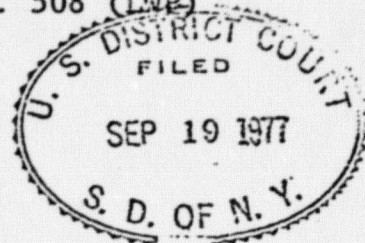
-v-

WALTER JOHN KUBIT,

Defendant.

INDICTMENT

S 77 Cr. 508 (LWB)



COUNTS ONE THROUGH FIVE

The Grand Jury charges:

1. From on or about the first day of October, 1970 and continuously thereafter until on or about the second day of December, 1975, in the Southern District of New York, WALTER JOHN KUBIT, the defendant, in a matter within the jurisdiction of the United States, to wit, the Veterans Administration, unlawfully, wilfully and knowingly did falsify, conceal and cover up by trick, scheme and device material facts, and did make false, fictitious and fraudulent statements and did make and use false writings and documents, knowing such statements, writings and documents were false, fictitious and fraudulent, in that the defendant induced the Veterans Administration by trick and fraud to mail to the defendant Veterans' benefit checks belonging to others, which checks the defendant appropriated for his own use and cashed by forging the endorsement of the true payees.

2. As part of said scheme, the defendant insinuated himself with two veterans, Herman Leibler and Thomas J. O'Brien, who were not then receiving veterans' benefits but whom the defendant believed were eligible for such benefits, and advised them that he could assist them in applying for and obtaining such benefits.

MICROFILM
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3. As a further part of said scheme, the defendant filled out various benefit application forms and related letters and documents in the names of Mr. Leibler and Mr. O'Brien, and in so doing inserted his own mailing address on such forms instead of the proper addresses of Mr. Leibler and Mr. O'Brien. Further, when the defendant's own mailing address changed he submitted change of address forms to the Veterans Administration in the names of Mr. Leibler and Mr. O'Brien to assure that he would continue to receive the benefit checks to which they were rightfully entitled.

4. On or about the dates set forth in Counts One through Five of this Indictment, in the Southern District of New York, WALTER JOHN KUBIT, the defendant, submitted documents to the Veterans Administration which documents contained false, fictitious and fraudulent statements, known by the defendant to be false fictitious and fraudulent, in that the defendant placed his own mailing address on such documents instead of the correct address of Herman Leibler and Thomas J. O'Brien, as follows:

<u>COUNT</u>	<u>DATE</u>	<u>TYPE OF DOCUMENT</u>	<u>VETERAN</u>
1	December, 1972	Application	O'Brien
2	April, 1973	Income Statement	O'Brien
3	July, 1973	Income Statement	O'Brien
4	January, 1974	Change of Address	Leibler
5	December, 1975	Change of Address	O'Brien

(Title 18, United States Code, Section 1001.)

COUNTS SIX THROUGH NINE

The Grand Jury further charges:

On or about the dates set forth below in Counts Six through Nine, in the Southern District of New York, WALTER JOHN KUBIT, the defendant, unlawfully, wilfully, and knowingly falsely made, forged and counterfeited a writing, namely the endorsement of the payee on the United States Treasury checks described below, for the purpose of obtaining from the United States and their officers and agents sums of money:

<u>COUNT</u>	<u>CHECK NO.</u>	<u>APPROXIMATE DATE</u>	<u>AMOUNT</u>
6	18,976,314	7/1/75	\$160.00
7	24,688,745	9/1/75	160.00
8	80,359,613	10/1/75	160.00
9	29,598,914	11/1/75	160.00

(Title 18, United States Code, Section 495.)

COUNTS TEN THROUGH THIRTEEN

The Grand Jury further charges:

On or about the dates set forth below in Counts Ten through Thirteen, in the Southern District of New York, WALTER JOHN KUBIT, the defendant, unlawfully, wilfully and knowingly and with intent to defraud the United States, uttered and published as true and caused to be uttered and published as true, a false, forged and counterfeited writing, namely, the endorsement of the payee on certain United States Treasury checks knowing the name to be false, forged and counterfeited, the checks being those described in Counts Ten through Thirteen below:

RZ:jj

<u>COUNT</u>	<u>CHECK NO.</u>	<u>APPROXIMATE DATE</u>	<u>AMOUNT</u>
10	18,976,314	7/1/75	\$160.00
11	24,688,745	9/1/75	160.00
12	80,359,613	10/1/75	160.00
13	29,598,914	11/1/75	160.00

(Title 18, United States Code, Section 495.)

William A. Libron
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney



United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

WALTER JOHN KUBIT

Defendant.

INDICTMENT

S 77 Cr. 508 (LWP)

Title 18, USC §1001 and 495.

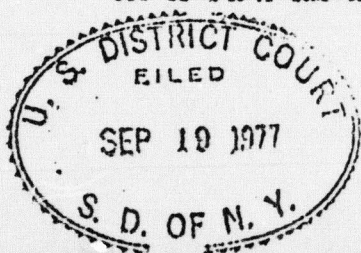
ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

William C. Brown
Foreman.

FPI-SS-2-19-71-20M-6950



Palmieri
September 27, 1977 - Jury trial begins as to all counts.

September 28, 1977 - Trial cont'd

September 29, 1977 - Trial cont'd

September 30, 1977 - Trial cont'd

October 3, 1977 - Trial cont'd - Court charges jury

October 4, 1977 - Deliberations cont'd.

October 5, 1977 - Jury reaches a verdict.

Jury finds deft not guilty on counts 1 thru 5 inclusive, and guilty on each of counts 6 thru 13 inclusive. PS I ordered. Sentence

November 16, 1977 at 4:30 - Bail is ~~set~~ at \$5,000 PRB to be signed by deft and James Collins.

Pierce, J

December 14, 1977 - Deft sentenced to one (1) year on each of its 6 thru 13 inclusive, to run concurrently with each other.
4/ Deft is Remanded
Pierce J
ch-

CHARGE OF THE COURT

(In open court, jury present.)

THE COURT: Counsel, ladies and gentlemen of the jury, Mr. Foreman:

Let me thank you all for your sacrifices in serving on this jury and also for paying attention to the evidence as it has been presented during this trial.

You all have been particularly attentive, and that is very important as we undertake to fulfill our responsibilities, insuring that a fair trial is presented to those who are accused.

So we are grateful to you for the important part which you play in the administration of justice as we undertake to administer it in our judicial system. I also wish to thank the attorneys for their cooperation in the trial. They have represented their respective sides with professional skill, competence and dedication. I ask you now to give me your attention so that you might understand the principles of law which are applicable in this case.

About one-third or perhaps even further down the line through this charge, I am going to recite various elements which I will describe as essential elements of

proof required for the government to meet its burden of proof in this case. When we get to that point, please do not feel that it is just all too confusing. Please keep in mind that juries are instructed in similar fashion almost every day of the week in this building and they wrestle with these principles of law, just as you are going to. I think you will find that most of what I am going to say is repeated more than once, and in any event, if there is anything you do not understand or anything you wish to have repeated, you have but to send out a written request asking for it and it will be read back to you.

Keep in mind that this is a law court and we are not here for social conversation. My job is to charge you with respect to the applicable principles of law, and that is what I am about to do. So first let me point out some general principles as to your duty and as to what you might and might not consider during your deliberations.

It is my function, as I have told you, to instruct you as to the law which applies in the case, and it is your duty to accept the law as I state it to you. It is your duty to apply the law to the facts in this case as you find those facts to be from your consideration

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2 of the evidence presented here. I ask you not to single
3 out any one instruction alone as stating the law, but
4 rather regard the instructions as a whole. And the logical
5 result of your application of the law to the facts
6 in this case as you find those facts to be should be
7 a verdict; a verdict of guilty or not guilty with
8 respect to the charges which are brought in this case.
9 You are the sole and exclusive judges of the facts in
10 this case. You must pass upon the weight of the evidence.
11 You must determine the credibility or believability of the
12 witnesses. You have to resolve any conflicts which

13 you find in the evidence. And you must draw such reasonable
14 inferences as are warranted by the evidence in this case.

15 With respect to any matters of fact, it is
16 indeed your recollection and yours alone which governs.
17 Anything which the attorneys or which I may say or
18 have said with respect to any matters in evidence or with
19 respect to any factual matters, are not to be substituted
20 for your own independent recollection of the evidence
21 or the facts in this case. You are not to assume that
22 I have any opinion as to whether or not the defendant here
23 is guilty or not guilty of these charges; or that I have
24 any view as to the truth or falsity of the charges asserted
25 in the indictment.

1
2 The fact that I may have asked some questions
3 or granted or denied motions during the course
4 of the trial is not to be taken by you as any indication
5 that the defendant is believed by the Court to be
6 guilty or not guilty. Further, keep in mind that the
7 attorneys have the right on the offer of certain evidence
8 to press certain legal objections and in doing so they are
9 simply performing their duty.

10 In your deliberations to determine the
11 facts and whether the government has established the
12 elements of the crimes charged, you are to consider

13 solely the testimony which you have heard from the witnesses,
14 any stipulations or agreements of fact the lawyers
15 have agreed upon, the exhibits which have actually been
16 received in evidence, and even any lack of material
17 evidence. But nothing else.

18 There are a number of factors which are not
19 evidence in this case and which you may not under any
20 circumstances consider during your deliberations.

21 First, if during the course of the trial a
22 question was asked and an objection was interposed, and
23 if I sustained the objection, you are to disregard the
24 question, and any alleged facts contained in the question.
25 If there was an answer to the question, then you are to

2 disregard the answer. And if I ruled that an answer be
3 stricken, then you are to disregard the answer and the
4 question in your deliberations.

5 You have heard the witness Herman Leibler
6 make several characterizations about the defendant, referring
7 to him by several uncomplimentary words. I ruled during
8 the trial that those comments be stricken from the record.
9 That means that you are not to consider them at all. They
10 are not evidence and should not influence your decisions
11 in any way.

12 The defendant, Walter John Kubit, is presumed
13 to be not guilty of the accusations contained in the indictment.
14 This presumption continues throughout the trial and
15 even during the course of your deliberations in the jury
16 room. So the presumption of innocence is sufficient to
17 acquit a defendant of crimes charged unless it is overcome
18 by evidence that satisfies your minds beyond a reasonable
19 doubt of the defendant's guilt.

20 Unless you are so satisfied, it is your sworn
21 obligation to find the defendant not guilty. If you are
22 so satisfied, it is your sworn obligation to find the
23 defendant guilty. As you approach the performance of
24 your function in this case, that is, the determination of
25 whether the defendant is guilty or not guilty of these

1 charges, please remember that it is your duty to weigh
2 the evidence calmly and dispassionately, without
3 prejudice or sympathy for or against either party. The
4 fact that the government is a party here or that the
5 prosecution occurs in the name of the United States of
6 America entitles it to no greater consideration than
7 that accorded to any other party; and by the same token,
8 it is entitled to no less consideration. All parties,
9 government and individual alike, stand equal before the
10 law.
11

12 The defendant on trial here has pleaded not
13 guilty. Consequently, if the defendant is to be
14 convicted, the government has the burden of proving each
15 and every element of the crimes charged beyond a reasonable
16 doubt. The burden of proving guilt beyond a reasonable
17 doubt never shifts. It remains upon the government
18 throughout the trial. The law never imposes upon a
19 defendant in a criminal case the burden of calling any
20 witnesses or producing any evidence. So the question
21 arises, what is a reasonable doubt? It is a doubt
22 which a reasonable person has after carefully weighing
23 all of the evidence. It is the kind of doubt which would
24 make you hesitate to act in the most important affairs
25 of your own life. Reasonable doubt is doubt which appeals

2 to your reason, your judgment, your common sense and your
3 experience. It is not caprice or whim or speculation.
4 It is not an excuse to avoid the performance of an unpleasant
5 duty. It is not sympathy for any party or any witness.
6 If, after a fair and impartial consideration of all of the
7 evidence or lack of evidence, you can honestly say that
8 you do not have an abiding belief as to the defendant's
9 guilt, then you have a reasonable doubt and it is your
10 duty to acquit.

11 On the other hand, if after a fair and
12 impartial consideration of all the evidence, you can
13 honestly say that you do have an abiding belief as
14 to the defendant's guilt, then you have no reasonable
15 doubt, and it is your duty to convict.

16 A reasonable doubt does not mean positive
17 certainty beyond all possible doubt. The law in a
18 criminal case is that it is sufficient if the guilt
19 of a defendant is established beyond a reasonable doubt,
20 not beyond all possible doubt.

21 From time to time you may have heard reference
22 made to direct evidence and to circumstantial evidence.
23 Let me explain the difference between the two. Direct
24 evidence is where a witness testifies to what he or she
25 saw, heard or observed. What he or she knows of his or her

own knowledge. Something which comes to the person by virtue of his or her senses. That is direct evidence.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

To state it somewhat differently, circumstantial evidence is a fact or a series of facts in evidence which have a logical tendency to lead the mind to a conclusion that another fact exists, even though there is no direct evidence to that effect. Let me give you one brief example.

If, when you left this courtroom during a recess, you could see that it was raining outside and that all the windows in the courtroom were closed and you saw that all of the window sills beneath the windows were dry, and then after a ten or fifteen-minute recess you came back to the courtroom and you found that all of the windows were still closed, but the sills were all wet, you could conclude that someone had opened the windows while you were outside the courtroom and that rain had come into the courtroom and fallen upon those window sills. You would arrive at this conclusion from circumstantial evidence.

2 In other words, you would infer on the basis
3 of reason and experience and common sense from one or more
4 established facts, the existence of some further fact.
5 A conviction may not rest upon suspicious circumstance
6 alone. However, circumstantial evidence, if believed,
7 is of no less value than direct evidence, for in either
8 case you must be convinced beyond a reasonable doubt
9 of the guilt of the defendant.

10 The counts of the indictment charge that the
11 acts charged occurred on or about certain dates. It does
12 not matter if a specific transaction is alleged to have
13 occurred on or about a certain date and the evidence
14 indicates that in fact it was on another date. The law
15 requires only a substantial similiarity between the dates
16 alleged in the indictment and the dates established by the
17 evidence.

18 Also, as I told you at the beginning of the
19 trial, an indictment is not evidence. It is a procedure
20 or a method by which persons accused by a grand jury of
21 crimes are brought to trial. Whether the person
22 accused is guilty or not guilty of the crimes charged
23 is determined by a trial jury such as you are. No
24 inference of any kind may be drawn from the mere existence
25 of the indictment.

2 You have heard testimony by a special
3 agent of the Secret Service that the defendant made
4 statements after he was arrested. If you find that the
5 defendant did make the statements, then you may give
6 them such weight as you believe they deserve, after
7 considering all the circumstances which were brought out
8 in the evidence.

9 There has been testimony that the defendant
10 made a number of statements tending to show his innocence
11 at the time of his arrest in this case. There has also
12 been evidence presented which if believed by you, you
13 may find renders the defendant's statements to be false.
14 I charge you that exculpatory statements, if shown to be
15 false, may be considered by you as circumstantial
16 evidence of guilt consciousness. You as jurors are
17 the sole judges of the credibility of the witnesses and
18 of the weight their testimony deserves. You know that
19 there is no automatic way to decide who is telling
20 the truth and who is not. Credibility can be equated
21 with believability. If a witness is credible, you say
22 he or she is believable. You should carefully scrutinize
23 all the testimony given, both on direct examination and
24 cross examination and otherwise, and the circumstances
25 under which each witness has testified.

2 You should consider every matter in evidence
3 which tends to show whether a witness is worthy of
4 belief. You should consider the witness' ability to observe
5 the matters as to which he or she has testified, and
6 whether the witness impresses you as having had an
7 accurate recollection of these matters. The fact that a
8 witness is an employee of the government does not
9 mean that you should give greater or lesser credit
10 to the witness' testimony. Such testimony should be
11 scrutinized in the same manner as that of any other
12 witness.

13 A witness may be discredited or impeached by
14 contradictory evidence or by evidence that at other
15 times the witness made statements inconsistent with the
16 witness' present testimony. If you believe that any
17 witness has been impeached and thus discredited, it is
18 your exclusive province to give the testimony of that
19 witness such credibility, if any, as you think it
20 deserves.

21 When judging credibility, consider any
22 relation any witness may bear to any side of the case.
23 Consider the manner in which each witness might be
24 affected by the verdict and the extent to which if at all
25 each witness may be connected by such evidence in the case.

1
2 If you find that any witness has testified
3 willfully, falsely to any material matter, you may reject
4 the entire testimony of the witness or you may accept
5 such portion of it as you believe to be true. In this
6 case the defendant has taken the stand. There is no
7 compulsion or obligation upon a defendant to testify, as
8 I have said. But once a defendant takes the stand and
9 does testify, he is tested by all the same rules and
10 guides that any other witness is tested by.

11 You know, of course, that the defendant is
12 interested, vitally interested in the outcome of
13 the case, and interest is a factor that you must take
14 into consideration in assessing the testimony of any
15 witness, whether presented by the government or the
16 defense. In a federal criminal trial, both the government
17 and the defendant are entitled to receive from the clerk
18 of the court a subpoena calling for the attendance of
19 a witness; and no matter where the witness lives in
20 the United States, the witness is required to appear
21 when served with such a subpoena. You may find that
22 certain witnesses could have been called by either
23 side here, so that from the failure of either side to
24 call any such witness you may infer the witness'
25 testimony might have been unfavorable to either the

1 government or to the defendant. But it is equally
2 within your discretion to draw no inference at all from
3 the failure of the government or the defendant to
4 call any such witness. You cannot draw any such
5 inference with regard to a witness or exhibit that is
6 equally available to both parties or where the witness'
7 testimony would be merely what we call cumulative.
8 Further, I remind you again that a defendant is under
9 no obligation to offer any evidence whatsoever. The
10 rules of evidence ordinarily do not permit witnesses to
11 testify as to opinions or conclusions. An exception
12 to this rule exists as to those whom we call expert
13 witnesses, witnesses who by education and experience have
14 become expert in some science, profession or calling.
15 They may state their opinions as to relevant and material
16 matters in which they profess to be expert and they may
17 also state their reasons for their opinions.

18
19 In this case, Mrs. Pearl Tytell, you will
20 recall, was presented by the government as a
21 handwriting expert, and where the genuineness of handwriting
22 is in issue, any proved handwriting of a person may be
23 received in evidence to be used as a specimen or a
24 standard for comparison with handwriting which is in
25 dispute. In this case, it has been stipulated that the

specimens were standards that were written by the defendant. A handwriting expert might state her opinion as to whether documents in evidence were written by the same person by comparing the handwriting in dispute with a proven specimen, and the same is true in making a comparison of type and typewriters. And you should give such expert's testimony such weight as you may think it deserves. Should you decide that an expert witness is biased or prejudiced or that the opinion of an expert witness is not based upon sufficient education and experience, or should you conclude that the reasons given in support of the opinion are not sound or should you feel that it's outweighed by other evidence, then you may disregard the opinion entirely.

In regard to all witnesses, the ultimate question for you to decide in passing on the credibility of the witness is: Did the witness tell the truth before you? And it is for you to say whether a witness's testimony at this trial was truthful or untruthful in whole or in part.

Lastly, I should tell you that as you are well aware, there have been several occasions during the course of the trial for the lawyers to confer with the Court out of your hearing. You are not to speculate as to

what was being discussed. Such conversations were held at the bench to avoid having you listen to conversations on the law which were designed to determine whether such evidence presented to you should have been presented to you under the rules of evidence.

This completes my general instructions as to what your general duties and functions are, with regard to what you may and may not consider during your deliberations. Now I am going to turn to a discussion of the specific charges against the defendant and instruct you as to what essential elements the government must prove beyond a reasonable doubt in order to sustain the charges against the defendant.

The indictment contains thirteen counts. Each count charges the defendant, Walter John Kubit, with a separate crime. A count in an indictment is essentially a charge or an accusation. The thirteen charges or accusations in this indictment fall into three categories.

Counts 1 through 5 charge the defendant with making false statements to the Veterans Administration in violation of federal law. Counts 6 through 9 charge the defendant with forging the endorsement of the payee on four United States Treasury checks. And counts 10 through 13 charge the defendant with uttering or presenting

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2 those four checks with forged endorsements.

3 We are going to send in a copy of the
4 indictment so that you will be able to see this for
5 yourself.

6 In counts 1 through 5 of the indictment, the
7 grand jury charges that the defendant Kubit violated
8 federal law, and the particular statute in question
9 provided in pertinent part as follows: "Whoever in any
10 matter within the jurisdiction of an agency of the
11 United States, knowingly and willfully makes or
12 uses any false writing or document, knowing the same to
13 contain any false, fictitious or fraudulent statement or
14 entry, commits a crime."

15 I will now read counts 1 through 5. The
16 grand jury charges: "1. From on or about the first day
17 of October, 1970 and continuously thereafter until on or
18 about the second day of December, 1975, in the Southern
19 District of New York, Walter John Kubit, the defendant, in a
20 matter within the jurisdiction of an agency of the United States,
21 to wit, the Veterans Administration, unlawfully, willfully
22 and knowingly did falsify, conceal and cover up by
23 trick, scheme and device, material facts and did make
24 false, fictitious and fraudulent statements, and did
25 make and use false writings and documents, knowing such

1
2 statement, writings and documents were false, fictitious
3 and fraudulent, in that the defendant induced the Veterans
4 Administration by trick and fraud to mail to the defendant,
5 veterans benefit checks belonging to others, which
6 checks the defendant appropriated for his own use and
7 cashed, by signing the endorsement of the truee payees.

8 "2. As part of said scheme, the defendant
9 insinuated himself with two veterans, Herman Leibler and
10 Thomas J. O'Brien, who were not then receiving veterans
11 benefits, but whom the defendant believed were eligible
12 for such benefits and advised them that he could assist
13 them in applying for and obtaining such benefits.

14 "3. As a further part of said scheme, the
15 defendant filled out various benefit application forms
16 and relayed letters and documents in the names of
17 Mr. Leibler and Mr. O'Brien, and in so doing inserted
18 his own mailing address on such forms, instead of the
19 proper addresses of Mr. Leibler and Mr. O'Brien.

20 "Further, when the defendant's own mailing
21 address changed, he submitted change of address forms
22 to the Veterans Administration in the names of
23 Mr. Leibler and Mr. O'Brien to assure that he would
24 continue to receive the benefit checks to which they
25 were rightfully entitled.

"Four. On or about the date set forth in counts 1 through 5 of this indictment in the Southern District of New York, Walter John Kubit, the defendant, submitted documents to the Veterans Administration, which documents contained false, fictitious and fraudulent statements known by the defendant to be false, fictitious and fraudulent, in that the defendant placed his own mailing address on such documents instead of the correct address of Herman Leibler and Thomas J. O'Brien, as follows:

"Count 1. December 1972 application, veteran: O'Brien.

"Count 2. April, '73 income statement, veteran: O'Brien.

"Count 3. July, 1973 income statement, veteran: O'Brien.

"Count 4. January, 1974 change of address, veteran: Leibler.

"Count 5. December, 1975 change of address, veteran: O'Brien."

Title 18, United States Code, Section 1001. The offense charged in each of these counts has four elements. In order to find the defendant guilty as to any of these counts, you must find the government has

proved each of the four elements beyond a reasonable doubt as to the count you are considering. If the government fails to establish any one of these essential elements as to any count, then you must acquit the defendant on that count.

The four elements are as follows: 1. That on or about the date set forth in the count you are considering, the defendant used a writing or document in the Southern District of New York. We are sitting in the United States District Court for the Southern District of New York, which includes Manhattan and the Bronx. Thus, this first element is satisfied if you find that the defendant submitted the particular document in question to the Veterans Administration in the Southern District of New York.

The second element is that the writing or document was used in a matter within the jurisdiction of a department or agency of the government of the United States. I charge you that the Veterans Administration is a department or agency of the government of the United States. I further charge you that any document such as applications or benefits submitted to a particular department or agency of the United States are matters within the jurisdiction of that department or agency.

2 Accordingly, if you find that the defendant
3 submitted to the Veterans Administration a document
4 in evidence, that is, an application, income statement,
5 or change of address form as charged in the count you
6 are considering, then this second element is satisfied
7 as to that count.

8 The third element is that the writing or
9 document contained a false, fictitious or fraudulent
10 statement or entry. A statement is false or fictitious
11 if it is untrue when made and known at the time to be
12 untrue by the person making it or causing it to be made.
13 A statement or representation is fraudulent if it is
14 known to be untrue and if it is made or caused to be
15 made with the intent to deceive the governmental agency
16 to which it is submitted.

17 This third element is satisfied as to the
18 count you are considering if you find that the defendant
19 placed his own mailing address on the document in
20 question without the permission of either an older or younger
21 Thomas J. O'Brien or Herman C. Leibler, or if you
22 find that the defendant made such a statement knowing it
23 to be untrue, but with the intent of deceiving the Veterans
24 Administration.

25 The fourth and final element with respect to

counts 1 to 5 is that the defendant acted knowingly and willfully and that he knew that the writing or document contained a false, fictitious or fraudulent statement or entry.

In considering any of the 13 counts, whether it be the charge of making a false statement, which I am now discussing, or the charges of forgery and uttering, which I will mention in a while, you must determine whether the defendant acted knowingly and willfully.

An act is done knowingly if it is done voluntarily and not because of mistake or accident or for some other innocent reason. An act is done willfully if it is done voluntarily, intentionally, and deliberately, and with the specific intent to do something which the law forbids. Specific intent as the term implies, means more than the general intent to commit the act. It means to act with the purpose either of disobeying or disregarding the law. It is not always possible to ascertain or prove directly the operation of one's mind or the intention of a defendant. You cannot look into a defendant's mind and see what he knew or what his intentions were, but you are able to consider all of the facts and circumstances shown by the evidence in the case,

1 and you are able to draw your own conclusions with a reasonable
2 degree of accuracy as to what, if anything, the defendant
3 knew or did not know and what the intentions of the
4 defendant were.
5

6 Intent involves a mental attitude from
7 evidence of particular actions. Coupled with evidence of
8 surrounding circumstances, one may choose to draw certain
9 conclusions. In other words, proof of the circumstances
10 surrounding a person's actions, if found to exist, can
11 supply an adequate basis for a finding, should you choose
12 to make it, that the defendant acted knowingly and willfully.

13 The fourth element is satisfied if you find
14 that the defendant put his own mailing address on such
15 document instead of the correct address of Herman Leibler
16 or Thomas J. O'Brien in the document in the count you
17 are considering, with knowledge that such statement was
18 false, and with knowledge that he did not have the valid,
19 knowing permission of the veteran in question.

20 These then are the essential elements which
21 the government must prove in order to convict the
22 defendant of any of the counts numbered 1 through 5.

23 It is the government's burden to prove
24 each of these elements beyond a reasonable doubt. If it
25 does, it is your duty to convict the defendant on the count

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2 you are considering. If it does not, it is your duty to
3 acquit.

4 Let's move on to counts 6 through 9 and also
5 10 through 13. These relate to the forging and
6 uttering of government checks. The defendant is charged
7 with having violated federal law which provides in
8 pertinent part as follows: Whoever falsely makes,,
9 alters, forges or counterfeits any writing for the
10 purpose of obtaining or receiving from the United States
11 or any officers or agents thereof any sum of money, or
12 whoever utters or publishes as true any such false, forged,
13 altered or counterfeited writing with intent to defraud the
14 United States, knowing the same to be false, altered,
15 forged or counterfeited commits a crime.

16 You will note that the statute describes
17 two defenses. One, forging a writing, and two, what
18 we call uttering. That is passing as true, the
19 forgery. The indictment in this case charges both crimes.
20 For counts 6 through 9 allege that defendant actually
21 forged the endorsement on four checks, and the remaining
22 four counts charge that the defendant uttered those endorsements
23 that is,, presented them as if they were valid signatures.

24 There may appear to be some overlap between the forgery
25 counts and the uttering counts. However, I instruct you that

they are separate charges with elements that are not exactly the same. In addition, I remind you that the defendant is only being charged with forging and uttering four checks. Those four checks bear the name of Thomas O'Brien as payee. Let me read counts 6 through 9.

"The grand jury further charges on or about the dates set forth below in counts 6 through 9, in the Southern District of New York, Walter John Kubit, the defendant, unlawfully, willfully and knowingly falsely made, forged and counterfeited a writing, namely the endorsement of the payee on the United States Treasury checks described below, for the purpose of obtaining from the United States and their officers and agents, sums of money.

Then count 6, check number -- I won't read that to you. Approximate date, July 1, '75; amount, \$160.

Count 7, check number as set forth; approximate date September 1, 1975; amount, \$160.

Count 8, check number set forth; approximate date, October 1, 1975; amount, \$160.

Count 9, check number set forth: approximate date, October 1, 1975; amount, \$160.

Title 18, United States Code, Section 493.

In order to convict the defendant on the charges of forgery in counts 6 through 9, you must find four essential elements proved by the government beyond a reasonable doubt:

First, that the check was a duly issued check of the United States. According to the testimony in this case, this is not in dispute.

Second, that on or about the date in the count you are considering, the defendant endorsed the check described in that count by writing the name of the payee, Thomas J. O'Brien, on the back of the check. That is also not contradicted. You have heard the stipulation that the defendant admits he signed the checks.

Thirdly, that the endorsement is a forgery. I instruct you that a person signing the check in the name of another commits forgery unless he has authority from the other person to do so or truly believes that he has such authority. The defendant contends with respect to counts 6 through 9, as well as with respect to counts 10 through 13, that a man who once lived at 334 West 88th Street referred to as the older Thomas J. O'Brien, authorized him to sign the checks. This older Thomas J. O'Brien is not the same Thomas J. O'Brien who has

1 testified in court. Defendant further contends that
2 he truly believed that the four checks he endorsed and
3 uttered or presented belonged to the older Thomas J.
4 O'Brien.
5

6 On the other hand, the government contends
7 with respect to counts 6 through 9, as well as counts
8 10 through 13, that the defendant knew that the four
9 checks in question belonged to the younger Thomas J.
10 O'Brien, and that the younger Thomas J. O'Brien did not
11 authorize the defendant to endorse or utter or present
12 the four checks.

13 The fourth element that the government
14 must prove beyond a reasonable doubt is that the
15 defendant acted knowingly and willfully and for the
16 purpose of obtaining a sum of money from the United States.
17 I have already instructed you as to the meaning of
18 knowingly and willfully. This element is satisfied
19 if you find that the defendant was not given the checks
20 by an older Thomas J. O'Brien or did not have such
21 person's authority to endorse any such check or did not
22 truly believe he had such authority. This element is
23 not satisfied if you find that the defendant was given the
24 checks by the older Thomas J. O'Brien and did have his
25 authority to endorse the checks or that defendant did truly

2 believe he had such authority. Again, remember that it
3 is the government's burden to prove the charges against
4 the defendant beyond a reasonable doubt; it is not the
5 defendant's burden to prove his innocence.

6 I have set forth the essential elements which
7 the government must prove in order to convict the
8 defendant on any of counts 6 through 9. It is the govern-
9 ment's burden to prove each of these elements beyond a
10 reasonable doubt. If it does, it is your duty to
11 convict the defendant on the count you are considering.

12 If it does not, it is your duty to acquit.
13 There is, as you know, a second set of charges under
14 this forgery and uttering statute which I have read to
15 you in part. They are contained in counts 10 through 13
16 of the indictment. Again, it's brief and I'll read it
17 to you.

18 Counts 10 through 13, "The grand jury further
19 charges that on or about the dates set forth below in
20 counts 10 through 13 in the Southern District of New York,
21 Walter John Kubit, the defendant, unlawfully, willfully
22 and knowingly and with intent to defraud the United
23 States, uttered and published as true and caused to
24 be uttered and published as true, a false, forged and
25 counterfeited writing, namely the endorsement of the payee
on certain United States Treasurer's checks, knowing same

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2 to be false, forged and counterfeited. The checks
3 being those described in counts 10 through 13 below. And
4 they are the identical checks that I just read to you
5 under counts 8 through 9, so I won't repeat that to you.
6 In violation of Title 18, United States Code, Section
7 495. To utter and publish, and we are near the
8 end -- to utter and publish a check simply means that
9 a person presents the check in exchange for money or
10 goods, and that the person says or implies that the
11 check is worth the amount stated on its face.

12 Also I instruct you that a check is a
13 writing within the meaning of the statute.

14 In order to convict the defendant on the
15 charges of uttering in counts 10 through 13, you must
16 find three essential elements proved by the government
17 beyond a reasonable doubt.

18 First: That the endorsement of Thomas J.
19 O'Brien on the back of the check you are considering
20 is a forgery.

21 Secondly: You ~~must~~ find that on or about
22 the date charged in the count you are considering, the
23 defendant offered the check to someone else knowing this
24 endorsement was a forgery.

25 I have previously instructed you as to the

essential elements of forgery. To find the defendant guilty of uttering and publishing, it really is not necessary that you find that the defendant himself forged the signature to the check. However, you must find beyond a reasonable doubt that the endorsement on the check was false, forged, altered or counterfeited and that the defendant knew it was false, forged, altered or counterfeited when he presented it.

Thirdly and finally, you must find beyond a reasonable doubt that the defendant acted knowingly and willfully and intended to defraud the United States. As to this last element of this offense, it is not necessary to prove that the defendant knew that the government would suffer a loss of money, if there was any. It is enough that the unlawful activity he engaged in for the purpose of frustrating the administration of a statute or that it tended to impair a governmental function.

The disbursing of veterans benefits would be a governmental function. The evidence need not establish that the United States or any person was actually defrauded. But only that the defendant acted with the intent to defraud. Obviously a person could not act with intent to defraud if the person did not know that the

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2 writing in question was not as it was presented to be.

3 So the government must prove beyond a reasonable doubt
4 that the defendant knew that the check in question was
5 false, forged, altered or counterfeited. As I noted
6 in discussing the false statement counts, counts 1 through
7 5, and the forgery counts, counts 6 through 9, you must
8 also determine with respect to counts 10 through 13
9 whether the defendant acted knowingly, and willfully
10 as I have defined those terms for you.

11 Please recall my brief statement as to the
12 defendant's contentions, and as to the government's
13 contentions concerning an older Thomas J. O'Brien
14 and a younger Thomas J. O'Brien. This element, this
15 third element is satisfied if you find that the defendant
16 was not given the checks by an older Thomas J. O'Brien
17 or the authority to endorse them by such person or the
18 authority to utter or present them or did not truly
19 believe that he had such authority.

20 This element is not satisfied if you find
21 the defendant was given the checks by the older Thomas J.
22 O'Brien and did have his authority to endorse checks and
23 to utter or present them or did truly believe that
24 he had such authority. Please remember again that it
25 is the government's burden to prove the charges against

the defendant beyond a reasonable doubt, and not the defendant's burden to prove his innocence.

If you find each essential element in counts 10 through 13 proved beyond a reasonable doubt, then it is your duty to return a verdict of guilty on the count you are considering. If you have a reasonable doubt as to any element, then it is your duty to find the defendant not guilty of the crime charged in that particular count.

I have described the charges contained in each of the thirteen counts in the indictment against the defendant here on trial. I have outlined the essential elements of those counts. Again, you should note that a separate crime or offense is charged in each of those thirteen counts. Each charge and the evidence pertaining to it should be considered separately. The fact that you find the accused guilty or not guilty as to one of the offenses charged should not influence your verdict as to the other offenses charged.

Also, you are not to consider in any way or speculate about any sentence a defendant may receive if found guilty. It is the function of the jury to deliberate and determine whether a defendant is

1 guilty or not guilty on the basis of the evidence and
2 the Court's instructions as to the law, and it is the
3 function of the Judge to determine the disposition of
4 the defendant's case thereafter. The most important
5 part of the case is the part which you will shortly
6 as jurors begin to assume, because it is you who will
7 have to determine whether a defendant is guilty or not
8 guilty of the counts charged.
9

10 I know that you will try the issues that
11 have been presented to you according to the oath
12 that you have taken as jurors. In that oath you will
13 recall that you promised that you would well and truly
14 try the issues joined in this case and a true verdict
15 render.

16 If you follow that oath and try the issues
17 without confusing your thinking with emotions, you will
18 arrive at a just verdict. As you deliberate, please be
19 careful to listen to the opinions of other jurors,
20 as well as to ask for an opportunity to express your own
21 views. No one juror holds the center of the stage in
22 a jury room and no one juror controls or monopolizes
23 deliberations. You must all express your views and
24 exchange views.

25 If you become convinced that your original view

2 was wrong with respect to any matter, don't be afraid
3 to change your vote because of your own pride
4 in your original opinion or in reaction to the stubbornness
5 of another person.

6 On the other hand, don't surrender your
7 honest belief solely because of the opinion of your
8 fellow jurors or because you are outnumbered. You
9 understand, I'm sure, that in a criminal case in this
10 court, your verdict on each count must be unanimous.
11 That is, it must be joined in by each and every one of
12 you, whether the form of the verdict is guilty or
13 not guilty. And the form of the verdict is to be either
14 guilty or not guilty on each count of the indictment
15 that is before you.

16 During your deliberations you may send for
17 any exhibits in evidence that you desire to review. You
18 may request that any testimony be read back to you. You
19 may request any portion of this charge be read back
20 to you. All of your requests must be in writing. Whatever
21 you might request, please be mindful that it will be
22 extremely helpful if you are as specific as possible as
23 to what it is that you wish. If you wish certain
24 exhibits, describe them as best you can and we will proceed
25 to ferret them out and send it in to you. If you wish

2 certain testimony read back to you, let us know if you
3 wish all of the testimony read or some portion of it.
4 Perhaps you wish it all, in which event you can have it;
5 and perhaps you wish to have some part of it.

6 Sometimes you will wish to have simply that
7 which was asked upon the examination of one of the lawyers
8 and not the other or you may wish to have the other and
9 not the former or both. We will give you whatever you
10 want. Try to be specific.

11 With respect to this charge, to the
12 extent that you can be specific, if you wish any of the
13 charge read back to you, we can tailor it precisely to
14 your desires. Again, I am sending in a copy of the
15 indictment. Remember, it is not evidence.

16 Finally, you are instructed that you must not
17 reveal the standing of the jurors at any time during
18 your deliberations. That is, you are not to indicate the
19 split of any vote on any count on any verdict to anyone,
20 including the Court.

21 That is the end of my instructions.
22 I have to ask you to hold up on your deliberations and
23 just step out of the room for hopefully a very few
24 moments while I confer with counsel.

25 I will call you right back in.

2 (The jury left the courtroom.)

3 THE COURT: Mr. Gordon, I will take any
4 exceptions.

5 MR. GORDON: Your Honor, I hope my hearing
6 is correct. With respect to your uncalled witness
7 charge, I believe you said where the witness is uncalled
8 and is available to either side, the jury may not draw any
9 inference from the failure of either side to call. It's
10 my understanding that it should have been permissive
11 that the jury may infer but need not infer when the witness
12 is available to either side, that they may draw an
13 inference only when the witness is unavailable.

14 MR. ZEIGLER: Your Honor, I had a note on
15 the same question. My understanding is that you gave a
16 proper charge to equally available witnesses. But
17 you may have misspoken when you came to the sentence
18 about equally unavailable witnesses. You simply
19 neglected to say the "un."

20 MR. GORDON: You were going to leave that
21 out. I believe you ruled beforehand that there were
22 none who were unavailable.

23 THE COURT: It may be. Here's what I said.
24 "You may find that certain witnesses could
25 have been called by either side here, so that from the

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2 failure of either side to call any such witness, you
3 may infer that the witness' testimony might have been
4 unfavorable to either the government or the defendant,
5 but it is equally within your discretion to draw no
6 inference at all from the failure of the government or
7 the defendant to call any such witness."

8 MR. GORDON: That is the first part.

9 THE COURT: You have no quarrel with that
10 part?

11 MR. GORDON: No quarrel with that.

12 THE COURT: Then I went on and said: "You
13 cannot draw any such inference with regard to a witness
14 or exhibit that is equally available to both parties
15 or where the witness' testimony would be merely cumulative."
16 I see -- the confusion is --

17 I think you should just nullify
18 the first part of that.

19 MR. ZEIGLER: That is unavailable.

20 THE COURT: How is this?

21 "You cannot"-- the charge as given is closer
22 to what Mr. Gordon asked for. He asked in the last
23 sentence of his request number 8: "However, no such
24 inference should be drawn by you with regard to a
25 witness who is equally available to both parties."

Referring to where it was peculiarly within the power of one or another to produce the witness, will it be satisfactory to both sides if I say, 'You cannot draw any inference against either side with regard to a witness or exhibit that is equally unavailable to both parties or where the witness' testimony would be merely cumulative'?

MR. GORDON: I don't see that the word "equally" is necessary.

THE COURT: Right. Otherwise, see?

Read it back.

(Record read)

THE COURT: I will take out the equally and otherwise give it. Next.

MR. GORDON: With respect to the false statement charge, I know you did give it with respect to the other charges, but I didn't hear it with respect to the false statement charge, with respect to on or about the time, in the indictment, charged in the indictment.

I don't remember hearing that phrase. It is only relevant --

THE COURT: I don't follow you.

MR. GORDON: The government has to prove each element occurred on or about the time charged

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2 in the indictment, and I don't believe I heard that
3 with respect to counts 1 through 5. I did hear you say
4 that with respect to the remaining counts.

5 THE COURT: What I said was that, One: That on
6 or about the date set forth in the count you are
7 considering, the defendant used a writing or document
8 in the Southern District of New York. We are sitting
9 in the United States District Court, Southern District
10 of New York, which includes Manhattan and the Bronx.

11 and this first element is satisfied if you find
12 that the -- is that the one you are talking about?

13 MR. GORDON: In your introductory portion of
14 the false statement charge, I didn't hear it. If that
15 is the way you read it, it was there. I misheard it.

16 THE COURT: That is what I said.

17 MR. GORDON: If you said it, it's satisfactory.
18 Also with respect to the false statement charge, I believe
19 you said the defendant could be found guilty or should be
20 found guilty if he acted without permission or if the
21 statement with respect to his address was untrue and
22 with intent to defraud. I would except to any charge that
23 would permit the jury to convict the defendant if in
24 fact the defendant had permission of Mr. O'Brien or
25 Mr. Leibler with respect to that count. Whatever his intent,
if he had the permission.

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2 THE COURT: Which O'Brien?

3 MR. GORDON: The appropriate O'Brien, as
4 the case may be.

5 THE COURT: Which one is that?

6 MR. GORDON: It depends on which count we
7 are talking about. Count 5 it would be O'Brien the
8 elder. As to counts 1, 2, 3, it would be the younger.

9 Count 4 would be Leibler.

10 But you phrased it in the alternative,
11 suggesting they could convict if he acted with their
12 permission.

13 THE COURT: Here's the statement. I stated the
14 third element. I defined false or fictitious. I defined
15 fraudulent. "This third element is satisfied as to the
16 count you are considering," I said then, "if you find
17 that the defendant placed his own mailing address in the
18 document in question without the permission of either
19 an older or younger Thomas J. O'Brien or Herman
20 Leibler." And then I said, or if you find that the defendant
21 made such a statement knowing it to be untrue but with
22 the intent of deceiving the Veterans Administration."

23 How about that portion, Mr. Zeigler?

24 MR. ZEIGLER: I think that is perfectly
25 proper, your Honor. If he had the technical permission but

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2 it wasn't a valid and knowing permission, the statement
3 would be untrue and he would know he was doing it through
4 deceit. It seems to me that "or" encompasses those
5 two possibilities, the lack of permission or the
6 existence of an invalid permission.

7 Frankly, I think it could have been charged
8 in much stronger terms, but I don't think Mr. Gordon
9 has anything to complain of.

10 MR. GORDON: My position is it should have
11 been conjunctive, not disjunctive.

12 THE COURT: You want to give me some authority
13 for your position? What supports you?

14 MR. GORDON: The position is that it's not
15 a false statement. Whatever his intent may have been,
16 for instance, with respect to count 1, if the younger
17 Mr. O'Brien gave him permission to use that address,
18 I submit to the Court that the false statement charge
19 falls, no matter what Mr. Kubit's intent.

20 MR. ZEIGLER: Of course, your Honor has
21 already resolved that question in denying Mr. Gordon's
22 motions at the close of the government's direct case.
23 If the legal theory is a proper one that there could be
24 permission but it's not a proper and valid one and the
25 statement can be false, then the charge as you gave it can be

2 perfectly proper.

3 THE COURT: It looks to me as though your
4 exception, Mr. Gordon, goes to the charge insofar as
5 it undertakes to discuss fraudulent. I stated that
6 a statement or representation, is fraudulent if it is
7 known to be untrue and if it is made or caused to be made
8 with the intent to deceive the government agency to which
9 it is submitted. Imagine that against the portion
10 following "or" in what follows. I said, "Or if you find
11 that the defendant made such a statement knowing it to
12 be untrue, but with the intent of deceiving the Veterans
13 Administration." The only thing I might have said differently
14 or could perhaps have said "and" instead of "but." I
15 agree with Mr. Zeigler that, if anything, it's pro defendant
16 as stated.

17 MR. GORDON: My position is that the
18 statement is not untrue. The mailing address, which is
19 the statement we are concerned about, is not an untrue
20 statement if it is made with the permission of the
21 appropriate Mr. O'Brien.

22 And therefore --

23 THE COURT: I told them in the earlier
24 portion, I said this third element is satisfied if you
25 find that the defendant placed his own mailing address

in the document in question without permission of either an older or younger Thomas J. O'Brien.

MR. GORDON: That makes him guilty. If it was with permission, then the statement is not an untrue statement.

THE COURT: You would have me charge that on the other hand if you find that it was with the permission of Thomas J. O'Brien, that the element is not satisfied?

MR. GORDON: That's right.

MR. ZEIGLER: Where your Honor chooses to charge that, I would have to request that you clarify what is meant by permission.

THE COURT: Yes. Mr. Zeigler, assist me by telling me which of the counts between 1 and 5 would involve the younger-- quite explicitly.

MR. GORDON: 1, 2 and 3.

MR. ZEIGLER: And 5.

THE COURT: 1, 2 and 3, you don't disagree?

MR. ZEIGLER: There is no dispute about 1, 2 and 3.

THE COURT: Are you concerned with Leibler?

MR. GORDON: No.

THE COURT: So your next concern is with

Count 5, right? That is where you diverge, Mr. Gordon, from Mr. Zeigler's position?

MR. ZEIGLER: As to which O'Brien it refers to.

THE COURT: As to which O'Brien.

MR. GORDON: That's correct.

THE COURT: Count 5, the government contends the defendant did not have the permission of the younger Thomas O'Brien -- correct so far?

MR. ZEIGLER: I would add, the valid and knowing permission.

THE COURT: Does that go with 5 or 1, 2 and 3?

MR. ZEIGLER: From the government's point of view, it goes to all false statement counts.

THE COURT: Let me try again --

MR. ZEIGLER: It certainly goes to 1, 2 and 3.

THE COURT: Where there is no dispute that we are talking about the younger O'Brien?

MR. ZEIGLER: Right.

THE COURT: Mr. Gordon contends he gave permission. You take the position yes, he gave permission but it was not a valid and knowing permission, which embraced all which was to happen.

MR. ZEIGLER: That is my contention as to count 1. As to counts 2 and 3, there is no question

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2 that the authority had ceased.

3 THE COURT: I will tell you what, Mr. Gordon.
4 Hand up in writing what it is you want me to say. Give
5 it to me in writing.

6 (Pause)

7 MR. GORDON: Your Honor, my point is that if
8 he acted with permission --

9 THE COURT: I want to hear what language
10 you want me to give this jury so I can say yes or no,
11 and it's all over. I am going to mark what you request
12 and make it a part of the record.

13 MR. GORDON: The part of my original request 5.

14 (Pause)

15 MR. GORDON: In the government's own request
16 number 8, the second paragraph which says a statement
17 or claim is fraudulent if it was made or caused to be
18 made with the intent to deceive. There are no requirements,
19 one, that it be made with the intent to deceive and two,
20 that it was fraudulent.

21 My position is clear. The statement is merely
22 as to what the mailing address is.

23 THE COURT: Why shouldn't this be given?

24 MR. ZEIGLER: Mr. Gordon is simply renewing
25 the argument --

2 THE COURT: Again, that why shouldn't it be
3 given?

4 MR. ZEIGLER: Because it overlooks the
5 fact that a statement can be fraudulent despite the
6 existence of a technical permission, if the permission
7 is not a valid one. It might simply say, "Placed his
8 own address as the mailing address without the permission
9 of Thomas J. O'Brien." That completely overlooks
10 your Honor's ruling on the defendant's motions for
11 acquittal, that the statements in counts 1, 2 and 3
12 could be false statements despite the testimony that
13 Thomas O'Brien gave his permission, because that
14 permission was not a knowing or voluntary one but was
15 induced by false representations and omission of material
16 facts. Unless that language is added to Mr. Gordon's
17 request, it's not a fair statement of the applicable
18 law.

19 I have no objection to this request as
20 it stands with the addition at the end of the first
21 paragraph of the following: "Such permission, if you
22 find it was given, must be knowing, voluntary and
23 not induced by false representation or material
24 omissions by the defendant."

25 I would also ask that that statement be added

to the second paragraph. If that statement is added to both paragraphs 1 and 2, I have no objection.

THE COURT: Pass it up.

(Pause)

THE COURT: I will give them both. Mr. Gordon's and the government's.

MR. GORDON: I would object to that, your Honor.

THE COURT: You have your objection. Give me the next one, sir.

MR. GORDON: The last one, your Honor: With respect to the forgery counts and the uttering counts, I believe you charged that the jury should find the defendant guilty if they find that he did not get the checks from the older O'Brien or with authority from Mr. O'Brien to endorse and utter, with respect to the uttering counts, or did not truly believe he had sufficient authority. The problem with that is again a problem of being disjunctive, and also with respect to the first element of that. After Mr. Kubit moved to 45 Wadsworth Terrace, he certainly did not, his position is not that he got the checks from Mr. O'Brien, but the checks came directly to him and he gave them to O'Brien.

1 Yet under your charge he could be found guilty
2 if the jury just finds that the checks came directly to
3 him and nothing more.
4

5 THE COURT: Is it not claimed that whoever
6 they came to, that -- is it not the charge here that
7 the checks were given to Mr. Kubit to endorse and cash?

8 MR. GORDON: That is certainly right, your
9 Honor. It's just it may be misleading.

10 THE COURT: It went through a whole chain
11 before Mr. Kubit got it, I assume, but in due course
12 the government through this indictment, the grand jury
13 at least, says there came a time when Mr. Kubit got
14 these checks and he endorsed them and it is your position
15 he got the checks from an older Thomas J. O'Brien --

16 MR. GORDON: No, after he moved to 45 Radsworth
17 Terrace it is not our position he got the checks
18 from O'Brien. He got the checks for O'Brien out of the
19 mail and then with the consent of O'Brien he endorsed
20 them.

21 But it is not our position that he got those
22 checks from O'Brien at any point.

23 THE COURT: You want that clarified?

24 MR. GORDON: Yes, your Honor. Also you have
25 it all in the disjunctive --

2 THE COURT: Let me just clarify the first
3 portion. It didn't pass through the hands of Mr. O'Brien
4 en route to Mr. Kubit. You want me to make it clear to
5 them that they came directly to Mr. Kubit and then it
6 was his understanding that he had authority to take
7 those checks --

8 MR. GORDON: That is not the position with
9 respect to 334 West 88th Street. The position is the
10 check came to Mr. O'Brien and ^{he} gave them to Mr. Kubit
11 at 45 Wadsworth. Mr. O'Brien wasn't living there.

12 THE COURT: So you take both positions, in
13 other words, it's a mixed situation with respect to
14 four checks.

15 MR. GORDON: That's right.

16 THE COURT: In one or more instances it's
17 claimed that checks came to the older Mr. O'Brien and he
18 gave them to Mr. Kubit --

19 MR. GORDON: With respect to the four checks
20 in the indictment, I guess those were all at
21 45 Wadsworth Terrace.

22 THE COURT: So therefore -- I will clarify
23 that. Checks came directly to defendant and did not go
24 to older Thomas J. O'Brien.

25 MR. GORDON: I didn't want that type of

2 clarification. I object to the word "from."

3 THE COURT: I will take "from" out.

4 MR. GORDON: From could be changed
5 to for. I am afraid your change could be that he acted
6 without Mr. O'Brien's permission.

7 THE COURT: You are entitled to have full
8 and complete clarification of anything erroneous. Instead
9 of "by" you want "for"?

10 MR. GORDON: Instead of "given by," I would
11 say "received for."

12 THE COURT: I am going to change "by" to "for."

13 MR. GORDON: Instead of "given," "was received
14 for."

15 THE COURT: All right.

16 MR. GORDON: Then you said "or," with the
17 authority to endorse "or" did not truly believe he had
18 such authority to endorse. I don't object to that
19 second "or" because I think it should be in the
20 disjunctive. But prior to that, it should be "and."

21 THE COURT: Yes, I think you are right.

22 MR. ZEIGLER: Would your Honor read the
23 sentence as it has been amended?

24 THE COURT: This element is satisfied, the
25 fourth element, counts 6 through 9 -- this element is

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2 satisfied if you find that the checks were received by
3 the defendant for an older Thomas J. O'Brien and the
4 defendant did not have such person's authority to
5 endorse any such check or did not truly believe he had
6 such authority. And the same thing --

7 MR. GORDON: No, there is something wrong
8 with that.

9 THE COURT: You better get it straight.

10 MR. GORDON: You can see what's wrong with
11 the first part.

12 THE COURT: This element is satisfied if you
13 find that the checks were received -- was not received
14 by the -- received for the older O'Brien, and that the
15 defendant did not have such person's authority to endorse.
16 Is that all right now?

17 MR. GORDON: Yes.

18 THE COURT: Then it is not satisfied if you
19 find that the checks were received by the defendant
20 for the older O'Brien and did have his authority.

21 Anything else?

22 MR. GORDON: No, except that should be both
23 with respect to the forgery count and the uttering count.

24 THE COURT: Same for uttering.

25 MR. ZEIGLER: Just two comments.

1
2 I believe in discussing the uttering charge
3 you may have said that he presented a false writing and
4 that the writing was the check. And that if they find
5 that the check is false, forged, altered or counterfeited
6 it's the government's position that the writing at issue
7 is the writing of the name Thomas O'Brien, the endorsement
8 on the back of the check. He was presenting that
9 endorsement in the uttering counts as being a genuine
10 endorsement, when it's the endorsement which is false or
11 forged.

12 There is no requirement that the jury find
13 that the check itself was false, forged, altered or
14 Counterfeited.

15 THE COURT: You are referring to counts 10
16 through 13?

17 MR. ZEIGLER: Yes, your Honor.

18 THE COURT: I said there were three essential
19 elements First, the endorsement on the back is counterfeit
20 or a forgery. Second, that on or about the date
21 charged -- to find the defendant guilty of uttering and
22 publishing it really is not necessary that you find
23 the defendant himself forged the signature on the check.
24 but you must find that the endorsement on the check was
25 false, forged, altered or counterfeited and that the defendant

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2 knew that it was false, forged, altered or counterfeited
3 when presented.

4 THE COURT: If you had the endorsement on
5 the check, that is fine. My recollection is that it
6 may have come out differently.

7 THE COURT: Anything else?

8 MR. ZEIGLER: The last thing is that in
9 discussing the question of specific intent, your Honor
10 did not include the phrase which as I recall was in
11 both the defendant's and the government's requests,
12 that it's not necessary that the defendant know he was
13 violating any particular law. I would ask that that be
14 included in the instructions.

15 THE COURT: I think what you are concerned
16 about on this other is reference to counts 10 through
17 13. I defined utter and publish. Then I concluded by
18 saying, "I also instruct you that a check is a writing
19 within the meaning of the statute."

20 MR. ZEIGLER: Right. It's the endorsement
21 which is the writing, which these counts are concerned
22 with.

23 (Pause)

24 THE COURT: I guess we are ready. Bring
25 the jury in.

(The jury entered the courtroom.)

THE COURT: Some modifications, changes and corrections.

With reference to counts 1 through 5 -- first with respect to count 1, you may only convict the defendant if you find that the government has proven beyond a reasonable doubt that on or about December, 1972, the defendant filed an application for veterans benefits for Thomas J. O'Brien and placed his own address as the mailing address, without the permission of Thomas J. O'Brien. Such permission, if you find it was given, must be knowing and voluntary, and not induced by false representations or material omissions made by the defendant.

With respect to counts 2 and 3, you may only convict the defendant if you find that the government has proven beyond a reasonable doubt that on or about April, 1973 and July, 1973 respectively, the defendant filed with the Veterans Administration income statements for Thomas J. O'Brien and used his own mailing address without the permission of Thomas J. O'Brien.

Again, such permission, if you find it was given, must be knowing and voluntary and not induced by false representations or material omissions made by

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2 the defendant.

3 With respect to count 4, you may only convict
4 the defendant if you find that the government has proven
5 beyond a reasonable doubt that on or about January, 1974,
6 Mr. Kubit wrote to the Veterans Administration to have
7 Mr. Leibler's mail, his checks, sent to Herman C.
8 Leibler, care of Cherry, 3594 Sherry Avenue, Wantagh,
9 Long Island, New York, without Mr. Leibler's permission.

10 With respect to count 5, you may only
11 convict the defendant if you find that the government has
12 proven beyond a reasonable doubt that on or about
13 December, 1975, the defendant wrote to the Veterans
14 Administration to have Mr. O'Brien's checks sent to
15 Thomas J. O'Brien, care of Gahm, 45 Wadsworth Terrace,
16 Apartment 4-C, New York, New York, 10040, without the
17 permission of a person he honestly believed to be
18 Thomas J. O'Brien and whom he honestly believed was
19 entitled to those checks.

20 On the matter of what inferences may or may
21 not be drawn where witness is or is not produced, I
22 charge you as follows: You cannot draw any inference
23 against either side with regard to a witness or exhibit
24 that is not ~~un~~available to both parties or where the
25 witness' testimony would be merely cumulative.

2 Let me correct something I told you earlier.
3 I told you that there were four elements that had to
4 be proven beyond a reasonable doubt by the government
5 with respect to counts 6 through 9. I told you the
6 meaning of the words knowingly and willfully. Then
7 I told you that this element is satisfied if -- I am
8 going to correct that portion of it. This element is
9 satisfied if you find that the checks were not
10 received by the defendant for an older Thomas J. O'Brien
11 and the defendant did not have such older person's
12 authority to endorse any such check or did not truly
13 believe he had such authority.

14 This element is not satisfied if you find
15 that the checks were received by the defendant for the
16 older Thomas J. O'Brien and the defendant did have
17 his authority to endorse the checks or the defendant did
18 truly believe he had such authority. The same instruction,
19 the same correction applies to counts 10 through 13.

20 With respect to all of the counts, I instructed
21 you with respect to specific intent and told you that it
22 means, among other things, to act with the purpose of
23 either disobeying or disregarding the law. I instruct
24 you further that it is not necessary that the defendant
25 know that he was violating any particular law.

2 With respect to counts 10 through 13, in
3 discussing uttering and publishing, I have defined that
4 for you, and I instructed you that a check is the writing
5 within the meaning of the statute. I correct that to
6 instruct you that the endorsements on the checks are
7 the writing within the meaning of the statute. I
8 guess that is it. I think that covers all of the matters.

9 All right, ladies and gentlemen.

10 Swear the marshal.

11 (At 7:14 P.M. a marshal was duly sworn.)

12 THE COURT: Ladies and gentlemen, it is
13 now your obligation to go and begin deliberations with
14 respect to this case.

15 (At 7:15 P.M. the jury retired to
16 deliberate upon a verdict.)

17 (Pause)

18 THE COURT: Let the record show that a
19 copy of the indictment is being sent in. Any problems
20 with it on anybody's part? Would anybody like to see it?

21 MR. GORDON: Yes, I'd like to see it.

22 THE COURT: It will be checked by the courtroom
23 deputy word by word and you can look at it, and you
24 can make it a Court's exhibit when it's returned.

25 (Pause)

2 MR. GORDON: It's fine with me. No objection.

3 THE COURT: Marshal, this can go in.

4 Further, is there any objection to numbered
5 exhibits which are sought by the jury being sent in upon
6 their request?

7 MR. GORDON: No objection from the defendant.

8 MR. ZEIGLER: None, your Honor.

9 MR. GORDON: May we leave them with
10 somebody?

11 MR. ZEIGLER: It's unlikely they are going to
12 request by number. Perhaps counsel could agree between
13 themselves where the appropriate responses are and only
14 request a ruling from your Honor if it's necessary.

15 THE COURT: Fine.

16 (Recess)

17 (A note was received from the jury at
18 8:35 P.M.)

19 (In open court, jury not present.)

20 THE COURT: We have several notes from
21 the jury. They are marked Court's 2, 3, 4, 5 and 6.
22 They have been shared with counsel. Court 6 asks for
23 the December, 1972 O'Brien application. I understand
24 with the agreement of counsel that has been sent in.

25 MR. ZEIGLER: It's Exhibit 2-A, your Honor.

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2 THE COURT: As to Court's 5, which is the Judge's
3 instructions to the jury--it's 8:35 now. We will send
4 them home about 9, so we won't give it to them tonight.
5 In any event, I will be more specific and ask them
6 which portion, if they can do that.

7 MR. ZEIGLER: No objection.

8 THE COURT: Court's 2, which presumably came
9 in three notes before this request for the jury charge,
10 asks how can you find the defendant not guilty on
11 a certain count and guilty on a certain count, and vice-versa.
12 It may be that the safest course is to suggest to them,
13 frankly the only answer, by giving them the charge that
14 is applicable and maybe they can combine that with this
15 request for the jury charge in Court's 5.

16 Court's 4, the testimony of the Secret
17 Service agent, we have. I am told it's only about
18 20 minutes. I suggest we do that now.

19 Court's 3 wants to know if Mr. Leibler was
20 reimbursed by the VA for all checks which he alleged
21 he did not receive from the defendant. My recollection
22 is there was no evidence about it one way or the other;
23 is that so?

24 MR. GORDON: That is my recollection.

25 MR. ZEIGLER: That appears to be so, your Honor.

2 THE COURT: We will just tell them that, that
3 there is no evidence on the question and so there is
4 nothing we can give them and they are not free to
5 speculate.

6 Is that satisfactory?

7 MR. GORDON: Yes, sir.

8 THE COURT: So that means we will have dealt
9 with Court's 3 and 4, leaving open Court's 2 and 5.

10 Bring in the jury.

11 (The jury entered the courtroom.)

12 THE COURT: We have your notes. Court's 6,
13 that is referring to 2-A in evidence, has been sent in
14 to you. So that has been complied with. We are going
15 to read to you the Secret Service agent's testimony as
16 you requested; that's Court's 4. We will do that
17 shortly..

18 As to your note which we have marked
19 Court's 3, the jury would like to know if Mr. Leibler
20 was reimbursed by the VA for all checks which he alleged
21 he did not receive from the defendant. None of us recall
22 that there was any evidence that had been presented on
23 the question one way or the other, so we cannot furnish
24 you with anything concerning that. You are not free to
25 speculate about the matter.

1
2 We are going to put over until tomorrow
3 morning your Court's 5, which is the Judge's instructions
4 to the jury, and we have in mind your Court's 2, which
5 is your question about whether the defendant can be
6 found guilty of Counts 6 through 9 and not guilty on
7 Counts 10 through 13 and vice-versa. It may be that the
8 answers to that are going to be made clearer to you upon
9 a rereading of the instructions. If so, fine. If not,
10 let us know.

11 However, before reading the instructions
12 to you, let me explain to you that we intend to divide
13 it into three parts. The last part you may feel that
14 you do not want, that is the part where I tell you to go
15 and deliberate and exchange views and if you want anything
16 sent in, we will send it in. All you have to do is
17 request it, et cetera. Just sort of generalized
18 instructions. If you want that, we will give it to you.
19 That is part 3.

20 Part 1 are the general rules, general
21 instructions that I gave you about reasonable doubt,
22 credibility, and of a right of other principles
23 concerning what you may consider and what you may not
24 consider. We call that part 1. If you want that,
25 we will give that to you.

Part 2 is where we give you the elements of the crimes charged, four elements for this, three elements for that. What is willfully and knowingly, what is the meaning of intent, et cetera. That is part 2. If you wish it all, we will give it all to you. If you just want a part, we will give a part to you. We'd like you to let us know in the morning your wishes in that regard.

We will await a note from you in the morning upon resuming, so that we will know what to do next. We will now proceed to Court's 4, the testimony of the Secret Service Agent. About that time it will be time to call it a day. The limousines should be here. We will simply adjourn until tomorrow morning.

(Record read.)

THE FOREMAN: We heard enough, your Honor.

THE COURT: Any time you want testimony read, feel free to let us know what you have heard that you want.

We will interrupt now and adjourn until tomorrow morning at 9:45, in the same jury room.

Mr. Foreman, you may not resume your deliberations until all of the jurors are present. You have to wait until everybody is here so you can resume deliberations. Once everybody is present, you are free

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2 to resume without any further instructions from me.

3 Please recall that we have two notes outstanding,
4 notes 2 and 5. They have to do with instructions. If
5 you choose to, and if you can narrow what it is that
6 you wish, feel free to do so.' Send us a note, and that
7 is what we will try to get for you. Don't talk about
8 this case among yourselves now that you are out of the
9 jury room and not deliberating. Don't talk about it
10 at home or with others.

11 You are a very special kind of group now,
12 you are a jury deliberating. So please preserve that status
13 with great care. And if there are any exhibits, they
14 will be returned through the marshal.

15 We bid you good night.

16 (The jury left the courtroom.)

17 (Court adjourned to October 4, 1977

18 at 9:45 A.M.)

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2 UNITED STATES OF AMERICA,

3 vs.

S-77 Cr. 508

4 WALTER JOHN KUBIT.

5
6 October 4, 1977
9:45 A.M.

7
8 (In open court, jury not present.)

9 (At 11:30 A.M. a note was received from
10 the jury.)

11 THE COURT: Have you agreed on a response
12 to the jury's question in Court Exhibit 8?

13 MR. ZEIGLER: We have.

14 THE COURT: Mr. Reporter, how long will it
15 take to read back?

16 THE REPORTER: About fifteen to twenty minutes,
17 your Honor, maybe less.

18 THE COURT: Bring in the jury as soon as you
19 can.

20 (The jury entered the courtroom.)

21 THE COURT: Good morning. We have your note
22 which has been marked Court's Exhibit 8. "Jury would like
23 to know where defendant received the 1020 figure to fill
24 out income statements for Mr. O'Brien in counts 2 and 3.
25 Was there any testimony on this point? If so, we would

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2 like to have this question or questions reread." With
3 the cooperation of counsel, that testimony has been
4 located by the court reporter and it will be read to you
5 now.

6 (Record read.)

7 THE COURT: All right, ladies and gentlemen,
8 please resume. We will take our lunch break from
9 one to two, counsel.

10 (Luncheon recess taken.)

11 oOo

2 AFTERNOON SESSION

3 (2:00 P.M.)

4
5 (At 2:00 P.M., a note was received from
6 the jury.)

7 (In open court, jury not present.)

8 THE COURT: We have two notes. Court's 9
9 and Court's 10. Court's 9 reads: "Please read to us
10 the revised charge to the jury."11 Court's 10 reads: "The part of the Judge's
12 charge relating to the signing of someone else's signature
13 with his permission."14 I propose two things. Since I have put
15 my hearing, which was scheduled for 11:30 and had to
16 be postponed because of this and other matters--it has
17 been postponed until two, and it is now just about
18 five after two. And there are nineteen lawyers and their
19 defendants waiting for me on the floor below. I have
20 proposed to have read to the jury all of what I referred
21 to as part 2 of the charge. That takes in counts 1
22 through 13 in their three separate groupings, rather than
23 to try to break out the revised charge and the part relating
24 to the signing.

25 I am going to read all of the charge insofar as

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2 it pertains to counts 1 through 13, which cl's up
3 revisions and picks up the signing with permission.

4 Is that satisfactory to you, counsellor?

5 MR. GORDON: Yes. With the understanding that
6 the revisions replace, rather than original.

7 THE COURT: Satisfactory to you, Mr. Zeigler?

8 MR. ZEIGLER: Yes, your Honor, but it would
9 be the government's position that you could have simply
10 read the revised charge, which deals with permission.
11 Part 2 is not really necessary.

12 THE COURT: I understand. Put that is what
13 we will do. And if there is no objection, it will be
14 read by my law clerk, since the court reporter must join
15 me for the 2 o'clock matter.

16 Again, having in mind that I have nineteen
17 defendants, nineteen lawyers waiting downstairs for me,
18 and they have been here since 11:30, and the hearing in
19 this case has been postponed because of this and other
20 matters once already.

21 So if there is no objection, I will do it
22 in that fashion. If any problem arises, send for me.
23 Sit in this seat and read it, and there is to be no further
24 communication with that jury by anybody. We will simply
25 do what I have just announced. The reading alone. And then

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2 if there are problems, they are to be sent back into the
3 jury room and I will come back up and hear the
4 attorneys.

5 MR. GORDON: The only thing that I would
6 request is that your Honor tell them the reason for the
7 procedure.

8 MR. ZEIGLER: I join in that.

9 THE COURT: Bring the jury in. Thank you both.
10 (The jury entered the courtroom.)

11 THE COURT: Ladies and gentlemen, we have
12 your notes. They have been marked Court's Exhibits 9 and
13 10. With the consent of the attorneys, we are going to
14 read to you part 2 of the charge, which will provide
15 you with answers to your two notes. It will embrace
16 the revisions that were made and will give it to you in
17 a total context rather than in some disparate manner,
18 and further will address the question of signing with
19 permission, which you have inquired about.

20 Again, with the consent of the attorneys,
21 I am going to ask my law clerk, Mrs. Chin, to read that
22 to you while I go down to the floor below to tend to
23 a matter which has already been delayed two or three
24 hours, which involves nineteen lawyers.

25 If there is any problem with this, they are

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2 going to interrupt--that is, after the reading if there
3 are any further questions, go right to the jury room.
4 There will be no further discussion in the courtroom
5 in my absence. You will have to go to the jury room and
6 send additional notes if you wish more.

7 With that, thank you.

8 Mr. Court Reporter, you will have to come with
9 me.

10 (Record read.)

11 (At 3:50 P.M., a note was received from
12 the jury.)

13 (In open court, jury not present.)

14 THE COURT: There is a note marked Court's
15 Exhibit 11. It says: "Please send in checks of July 1,
16 '75; September 1, '75; October 1, '75; and November 1, '75
17 of Thomas J. O'Brien. Over. Also the list of all of
18 Thomas O'Brien's checks."

19 THE COURT: There is no disagreement, as I
20 understand it, with reference to the four checks, and
21 consequently Government's Exhibit 3-B in evidence, 3-C
22 in evidence, 3-D in evidence, and 3-A in evidence will
23 be sent in; correct, Mr. Gordon?

24 MR. GORDON: Yes, your Honor. May I state
25 my position with respect to the other note?

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2 THE COURT: What about the list, gentlemen?

3 MR. GORDON: In other words, there are two
4 lists. And one list is before your Honor, which contains
5 all of the checks, including some of the checks that are
6 not in evidence.

7 However, there is another list, which appears
8 in -- I don't remember the letter, it's one of the
9 defendant's exhibits, -- which lists all the checks that
10 Mr. O'Brien stated that he did not receive. I'm not
11 sure it lists all the checks, but it lists all the checks
12 that are Exhibit 3 that he did not receive and his
13 explanation as to all of those checks. Perhaps the jury
14 means that list.

15 That list has a different number of checks
16 other than the list which is Government's Exhibit 2-P.

17 THE COURT: Where is that exhibit?

18 MR. GORDON: That is upstairs. That is the
19 list, if you remember, where incorrectly checked is that
20 Mr. O'Brien lived at 334 West 88th Street. That is the
21 list that he testified a Veterans Administration officer
22 prepared the initial two copies of and thereafter he used
23 that as a guide. That lists all the checks that
24 correspond to Government's Exhibit 3.

25 However, that is a different number of checks

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2 then what appears in Government's Exhibit 2-P. I don't
3 think it's clear from the jury's note which list they
4 want, or whether they want a list of all of the checks
5 that are in Exhibit 3, which is different from the list,
6 Government's Exhibit 2-P.

7 I think that is important.

8 THE COURT: Which would this be a copy of?
9 Is that a copy of all of those which are in 3?

10 MR. GORDON: And then some.

11 MR. ZEIGLER: All the checks that were sent
12 to Thomas O'Brien.

13 THE COURT: Is there a list that is limited
14 to 21 checks, Government's Exhibit 3 in evidence?

15 MR. ZEIGLER: There is no such list, your
16 Honor. What Mr. Gordon is referring to is a 38-page
17 document, two pages of Xeroxes of the non-receipt forms
18 which Thomas O'Brien filled out for each of the checks.
19 That is no more a list than the checks in Exhibit 3.

20 THE COURT: What is this 2-P in evidence?

21 MR. ZEIGLER: That is a list of the checks
22 which were sent to Thomas O'Brien from August of 1973 to
23 August of '74.

24 THE COURT: Filled by whom and given to whom?

25 MR. ZEIGLER: It was prepared by an official

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2 of the Veterans Administration. It was introduced in
3 evidence through Mr. Segal.

4 MR. GORDON: That is more than a list, the
5 same as the other one is more than a list. They both
6 contain information about a number of checks. Government's
7 Exhibit 2-P contains checks that are not either of the
8 four checks that Mr. Kubit is being charged with or the
9 similar acts, but additional checks. It includes all
10 the checks in Exhibit 3 and then includes some extras.

11 THE COURT: These that they are receiving,
12 3-A through 3-D are listed on 2-P?

13 MR. GORDON: They are also listed on the
14 other exhibit.

15 MR. ZEIGLER: This happens to be a list of
16 Thomas O'Brien's checks which I have referred to in my
17 closing argument to the jury and held up to them. It
18 is the only list of the checks in evidence the note
19 requests. It would be hard to understand that the jury
20 could be referring to anything else.

21 THE COURT: I am going to rule that this
22 seven-page list is more reasonable than that which they
23 are asking for; that it is more reasonable for me to
24 conclude that this is what they want than the 33-page
25 one, which is marked what?

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2 MR. ZEIGLER: I think it's Defendant's
3 Exhibit 2-P, your Honor.

4 MR. GORDON: It is certainly the non-receipt
5 forms. I would object to that and except to that and
6 also request that if that this 2-P goes into the jury,
7 that also all the checks go in, so the jury will see --
8 the jury may mistakenly believe that there is a check
9 in evidence that corresponds to every check in that list
10 and I would ask that the checks go in also.

11 MR. ZEIGLER: It seems to me in closing
12 arguments there was also a discussion of the retroactive
13 check. It was made amply clear to the jury that that
14 check was not in Exhibit 3. It was for the purpose of
15 illustrating the existence of that check that I held
16 up 2-P to the jury. It's difficult to prove that the
17 jury is going to be confused when they receive this list.

18 THE COURT: I think I will decline to send in
19 all of the checks, Mr. Gordon, particularly because they
20 asked for four specific checks quite explicitly, and they
21 asked for a list quite explicitly.

22 What we are called upon to do, at least what
23 I am called upon to do where the attorneys can't agree,
24 is to fathom which of two lists they want. I have
25 concluded that it is reasonable to conclude that they want

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2 the list that is marked 2-P in evidence. I am sending that
3 in and you have your exception.

4 MR. GORDON: I would ask that the other
5 list go in with it.

6 THE COURT: No, I'm not going to send both.
7 They asked for two lists. I have to make a judgment.
8 I have made it. You have your exception.

9 (Recess)

10 (Court adjourned to October 5, 1977, at
11 9:45 A.M.)

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2 UNITED STATES OF AMERICA,

3 vs.

S-77 Cr. 508

4 WALTER JOHN KUBIT.

5 October 5, 1977
6 9:45 A.M.

7 (In open court, jury not present.)

8 (At 10:45 A.M., a note was received from
9 the jury.)

10 THE COURT: Good morning.

11 We have three notes which will be marked
12 Court's 12, 13 and 14.

13 Taking 12 first, "What are the four elements
14 from the Court's charge to the jury on counts 1 to 5?"

15 I propose to read that portion of the
16 charge which deals with those counts. Is that satisfactory?

17 MR. GORDON: Yes, your Honor.

18 MR. ZEIGLER: Yes, your Honor.

19 THE COURT: As to note 14, "When did Mr. O'Brien
20 discover he was entitled to receive benefit pension
21 checks --"

22 MR. ZEIGLER: The date is November 1, 1975.

23 MR. GORDON: Agreed, your Honor. We have no
24 objection to you just so advising the jury.

25 THE COURT: All right.

2 Note number 13, "Does the commission of the
3 act, re: Submission --" I suppose it is "Re: Submitting
4 a change of address also have to bring profit to the doer
5 in order to make the doer guilty of the act?"

6 MR. ZEIGLER: The simple answer to that question
7 is no.

8 MR. GORDON: There is a simple answer to that
9 question and I think the answer is yes.

10 THE COURT: It's not so simple, is it?

11 MR. GORDON: Especially in view of the
12 government's stated theory of the case, throughout all
13 the evidence, through its opening, through its summation
14 and also in the indictment itself, there are preamble
15 paragraphs to the specific counts that clearly said that
16 Mr. Kubit allegedly changed the address for the purpose
17 of getting benefits for himself.

18 THE COURT: The indictment clearly says that
19 here in paragraph one, for example, it says, "Which checks
20 the defendant appropriated for his own use and cashed,"
21 et cetera.

22 MR. GORDON: Your Honor, it also appears in
23 paragraph 3 --

24 THE COURT: What do you think about this:
25 Suppose I take the position that the rereading of the

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2 instructions with reference to these counts we believe
3 addresses the issues that they must concern themselves
4 with, and further, if they reread -- rather, if they
5 read the indictment, considering the indictment, the
6 evidence, and the charge together, they should be able
7 to draw their own conclusions as to the answer to this
8 Court's 13.

9 MR. ZEIGLER: Your Honor's reference to the
10 indictment troubles me for this reason: It's conceivable
11 that the jury has, or members of the jury concluded
12 that at the time the defendant submitted those forms to
13 the Veterans Administration, his intent was a guilty
14 one; but that at some point this second O'Brien came into
15 his life and he did turn the proceeds of the check over
16 to O'Brien. So in the end he didn't profit from what
17 was in fact the crime that he intended to do when he
18 submitted the first O'Brien's forms.

19 THE COURT: What would you have me do, sir?

20 MR. ZEIGLER: My first instinct was to have you
21 say no, but my fallback position would be to rely
22 solely on the elements of the 1001 charge.

23 THE COURT: Why should we not do that,
24 Mr. Gordon?

25 MR. GORDON: The jury has heard the indictment

and it's clear that the government's theory is all along from the start Mr. Kubit changed the address for the purpose of getting the benefits himself.

Now for the first time the government is advancing a different theory --

THE COURT: To wit?

MR. GORDON: That perhaps he had that intent originally and then when O'Brien came along he gave the money to O'Brien.

THE COURT: I don't think he was advancing a different theory. I think it was just Mr. Zeigler's guess at what the jury was referring to.

What would you have me do?

MR. GORDON: I would have you say yes.

THE COURT: I'm not going to say yes or no.

MR. GORDON: Then my fallback position is that the jury be instructed to look at the elements of the offense and the indictment. The government chose to put that preamble in the indictment.

THE COURT: That is what I am going to do. It's there. Bring in the jury.

(The jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen. We have your notes and they have been marked

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2 as Court's exhibits. Let's take Court's 14 first.

3 "When did Mr. O'Brien discover he was
4 entitled to receive benefit pension checks from the VA?"

5 Counsel have agreed that the answer is
6 November 4, 1975.

7 You have another note which has been marked
8 Court's 12. It reads: "What are the four elements from
9 the Court's charge to the jury on counts numbered 1 to 5?"
10 And then we have your note which has been marked Court's
11 13, which reads: "Does the commission of the act, re:
12 Submitting a change of address, also have to bring
13 profit to the doer in order to make the doer guilty of
14 the act?"

15 I am going to read the elements as you
16 have requested; and it is my intention that the reading
17 of the elements will not only respond to your request in
18 that regard but will aid you with respect to your other
19 question, which is Court's 13.

20 You have a copy of the indictment which
21 has been sent in, so you can read what the indictment
22 says with respect to counts 1 through 5.

23 Please remember, of course, that that is not
24 evidence. You are free to have whatever evidence you
25 wish to send for, that is, exhibits and such, anything that

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2 you wish in that regard. Then by application of the law
3 as I read it to you to the facts as you find them, I
4 think you may find that you can answer the question.
5 At least we will see.

6 In counts 1 through 5 of the indictment,
7 the grand jury charges that the defendant violated
8 Section 1001 of Title 18 of the United States Code,
9 which provides in pertinent part as follows:

10 Whoever in any matter within the jurisdiction
11 of an agency of the United States, willfully and knowingly
12 makes and uses any false writing or document, knowing the
13 same to contain any false, fictitious or fraudulent
14 statement or entry, commits a crime.

15 I will not read counts 1 through 5 of the
16 indictment, since you have a copy of the indictment.
17 The offense charged in each of these counts has four
18 elements. In order to find the defendant, Mr. Kubit,
19 guilty as to each count, you must find that the
20 government has proved each of the four elements beyond
21 a reasonable doubt as to the count you are considering.

22 If the government fails to establish
23 any one of these essential elements as to any count,
24 then you must acquit the defendant on that count. The
25 four elements are as follows:

One. That on or about the date set forth in the count you are considering, the defendant used a writing or document in the Southern District of New York. As I told you, we are sitting in the Southern District of New York in this courthouse. That includes Manhattan and the Bronx, as well as other upstate counties. And thus this first element is satisfied if you find that the defendant submitted the particular document in question to the Veterans Administration in the Southern District of New York.

The second element is that the writing or document was used in a matter within the jurisdiction of a department or agency of the government of the United States. I charge you that the Veterans Administration is a department or agency of the government of the United States, and I further charge you that any document such as applications for benefits submitted to a particular department or agency of the United States are matters within the jurisdiction of that department or agency.

Accordingly, if you find that the defendant submitted to the Veterans Administration a document in evidence, that is, an application, income statement or change of address form as charged in the count you are

2 considering, then this second element is satisfied as to
3 that count.

4 The third element is that the writing or
5 document contained a false, fictitious, or fraudulent
6 statement or entry. A statement is false or fictitious
7 if it is untrue when made and known at the time to be
8 untrue by the person making it, or causing it to be made.
9 A statement or representation is fraudulent if it is
10 known to be untrue and if it is made or caused to be
11 made with the intent to deceive the government agency
12 to which it is submitted.

13 With respect to count 1, you may only
14 convict Mr. Kubit if you find that the government has proved
15 beyond a reasonable doubt that on or about December, 1972,
16 the defendant filed an application for veterans benefits
17 for Thomas J. O'Brien and placed his own address as the
18 mailing address, without the permission of Thomas J.
19 O'Brien. Such permission, if you find it was given, must
20 be knowing and voluntary and not induced by false
21 representations or material omissions made by the
22 defendant.

23 With respect to counts 2 and 3, you may only
24 convict the defendant if you find that the government has
25 proven beyond a reasonable doubt that on or about April of

1 '73 and July '73 respectively, the defendant filed with
2 the Veterans Administration income statements for Thomas J.
3 O'Brien and used his own mailing address without the
4 permission of Thomas J. O'Brien. Such permission, if
5 you find it was given, must be knowing and voluntary
6 and not induced by false representations or material
7 omissions made by the defendant.
8

9 With respect to count 4, you may convict the
10 defendant if you -- with respect to count 4, you may
11 only convict the defendant if you find that the government
12 has proven beyond a reasonable doubt that on or about
13 January of 1974 the defendant wrote to the Veterans
14 Administration to have Mr. Leibler's mail or checks,
15 checks here, sent -- mail or checks -- agreed?

16 MR. GORDON: No. I think probably would be
17 checks. Doesn't matter.

18 MR. ZEIGLER: Doesn't matter.

19 THE COURT: -- checks sent to Herman C.
20 Leibler, care of Cherry, 3504 Sherry Avenue, Wantagh,
21 New York, without Mr. Leibler's permission.

22 With respect to count 5, you may only
23 convict the defendant if you find that the government
24 has proven beyond a reasonable doubt that on or about
25 December of 1975 the defendant wrote to the Veterans

2 Administration to have Mr. O'Brien's checks sent to
3 Thomas J. O'Brien, care of Gahm, 45 Wadsworth Terrace,
4 Apartment 4-C, New York, New York, without the permission
5 of a person he honestly believed to be named Thomas J.
6 O'Brien, and who he honestly believed was entitled to
7 receive those checks.

8 The fourth and final element with respect
9 to counts 1 through 5 is that the defendant acted
10 knowingly and willfully and that he knew that the writing
11 or document contained a false, fictitious or fraudulent
12 statement or entry.

13 In considering any of these counts, you must
14 determine whether the defendant acted knowingly and
15 willfully. An act is done knowingly if done voluntarily,
16 not because of mistake or accident or for some other
17 innocent reason. An act is done willfully if done
18 voluntarily, intentionally, deliberately, and with the
19 specific intent to do something which the law forbids.
20 Specific intent, as the term implies, means more than
21 the general intent to commit the act. It means to
22 act with a purpose either of disobeying or disregarding
23 the law. It is, however, not necessary that a
24 defendant know that he was violating any particular law.
25 It is not always possible to ascertain or prove directly

1 the operation of the mind or the intention of a
2 defendant. We cannot look into a defendant's mind to see
3 what he knew or what his intentions were, but you are
4 able to consider all the facts and circumstances shown by
5 the evidence and exhibits in the case, and to draw your
6 own conclusions with a reasonable degree of accuracy
7 as to what, if anything, the defendant knew or did not
8 know and what the intentions of the defendant were.
9

10 Intent involves a mental attitude from
11 evidence of particular actions. Coupled with evidence of
12 surrounding circumstances, one may chose to draw certain
13 conclusions. In other words, proof of the circumstances
14 surrounding a person's actions, if found to exist, can
15 supply an adequate basis for a finding, should you
16 choose to make it, that the defendant acted knowingly and
17 willfully.

18 The fourth element is satisfied if you find
19 that the defendant put his own mailing address on such
20 document instead of the correct address of Herman Leibler
21 or Thomas J. O'Brien in the document in the count you
22 are considering, with knowledge that such statement was
23 false and with knowledge that he did not have the valid,
24 knowing permission of the veteran in question.

25 These then are the essential elements which

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2 the government must prove in order to convict the
3 defendant of any of counts 1 through 5. It is the
4 government's burden to prove each of these elements
5 beyond a reasonable doubt. If it does, it is your duty
6 to convict the defendant on the count you are considering;
7 and if it does not, it is your duty to acquit.

8 All right.

9 (At 11:15 A.M., the jury retired to
10 resume deliberations.)

11 (Recess)

12 (In open court, jury not present.)

13 THE COURT: We have a note from the jury
14 which has been marked Court's 15. I understand there is
15 a disagreement with the matter among counsel. The
16 reporter has brought up the testimony from the trial and
17 if -- is there disagreement?

18 MR. ZEIGLER: Yes, your Honor. Perhaps
19 I could state the problem.

20 The note asks for any testimony which
21 explains why the change of address form as received by
22 the Veterans Administration on November 25, 1975
23 was sent at that time.

24 I believe Mr. Gordon and I agree that there
25 is no testimony as to why the change of address form was

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2 sent at that time.

3 MR. GORDON: The word is filed.

4 MR. ZEIGLER: Or filed at that time. It's
5 the government's position that therefore the short and
6 simple answer to this question is there is no testimony.
7 Mr. Gordon's position is that there is testimony that
8 the exhibit was not filed on that date, and testimony as
9 to why it was filed when the defendant testified it was
10 filed.

11 MR. GORDON: No, to be more accurate, it's
12 that the change of address form was not filed on that
13 date, it was filed much earlier. And there is
14 testimony as to why it was not filed on that date,
15 November 25, 1975.

16 THE COURT: Do I recall that the testimony
17 was from Mr. Kubit?

18 MR. GORDON: Yes, sir.

19 THE COURT: And that he said in effect that
20 he had filled it out at some earlier point and that he
21 had mailed it much earlier than that, and that he had
22 no idea whatsoever as to why it would have been date
23 stamped received November of 1975.

24 MR. GORDON: I believe the testimony was to
25 the effect that, 'There would be no reason for me to file

2 it then. I had already been getting the checks at that
3 address." There would be no reason for him to -- that
4 was, I think, the thrust of his testimony. There would
5 be no reason to change the address to 45 Wadsworth,
6 because he was already getting the checks.

7 THE COURT: Let me make a ruling on it.

8 I agree with Mr. Zeigler at this point, that
9 since you both agree that there is no answer as such to
10 this direct question, that we should tell them that that
11 is the case.

12 I will inform them that if they wish any
13 more with respect to the matter, that they can ask for it.

14 MR. GORDON: I would ask that you should tell
15 them that there was evidence that --

16 THE COURT: No. Let me interrupt --

17 MR. GORDON: It was not filed at that
18 date and why it was not filed on that date. If they
19 want that testimony, they can have that read back.

20 THE COURT: First of all, do I assume
21 correctly that as a factual determination they are
22 reasonably free to determine that it was filed by
23 Mr. Kubit on November 25, 1975? Is that a possible,
24 reasonable, factual determination that they could make?

25 MR. ZEIGLER: There was testimony from

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2 Mr. Segal from the Veterans Administration that the date
3 stamp of that exhibit indicated to him that in the normal
4 course it would have been received on the day indicated
5 on the date stamp.

6 THE COURT: I believe that the way this
7 question is framed, I have to assume that they are
8 making certain factual determinations and I should not try
9 to tell them some other kind of evidence or any portion
10 of it, which is arrayed against what would appear
11 to be the factual determination they seem to be
12 obtaining.

13 In any event, no, the last sentence in
14 this note underscores the word "only." They are quite
15 explicit that they only, as they say, want that portion
16 of same reread. There is no answer. I think you should
17 tell them that.

18 Here's another note.

19 MR. GORDON: Also there is no testimony
20 that it was filed on November 5, 1975. It was received.

21 THE COURT: Recieved.

22 This note says -- it's a request by a juror
23 to have a call made regarding a personal matter, which
24 we will not mark as a court's exhibit, but show it to
25 counsel. If there is no problem with it, we will undertake

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2 to have the deputy court clerk or the law clerk make
3 that telephone call.

4 Would you ask the marshal to bring in the
5 jury.

6 It's agreed that it's a personal matter and
7 can be attended to?

8 MR. GORDON: Yes, your Honor.

9 MR. ZEIGLER: Yes, your Honor.

10 THE COURT: What juror?

11 THE CLERK: Juror number 9.

12 (The jury entered the courtroom.)

13 THE COURT: Mr. Foreman and ladies and
14 gentlemen, we have your note which has been marked
15 Court's Exhibit 15. It asks, "Was there testimony as
16 to why the change of address form was filed by Mr. Kubit
17 on November 25, 1975?"

18 There is agreement that the answer to the
19 question as such is no. Obviously there is evidence
20 concerning the count, the check, and if you require any
21 other information, you can send in another note and
22 ask for whatever it is you wish.

23 The answer to this question, "Was there
24 testimony as to why the change of address form was filed
25 by Mr. Kubit on November 25, 1975," is no.

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Juror No. 9, Mrs. Rosen, we have your note.
We will make that call. It is now lunch hour. Marshal,
the jury is to go out to lunch. We will take our own
recess from one to two.

Don't talk about the case outside the
jury room.

(The jury left the courtroom.)

(Luncheon recess taken.)

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CERTIFICATE OF SERVICE

March 1, 1978

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. Silbermann